CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

(To the United States Court of Appeals
for the Eighth Circuit.)

342 U.S.
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No. 327.

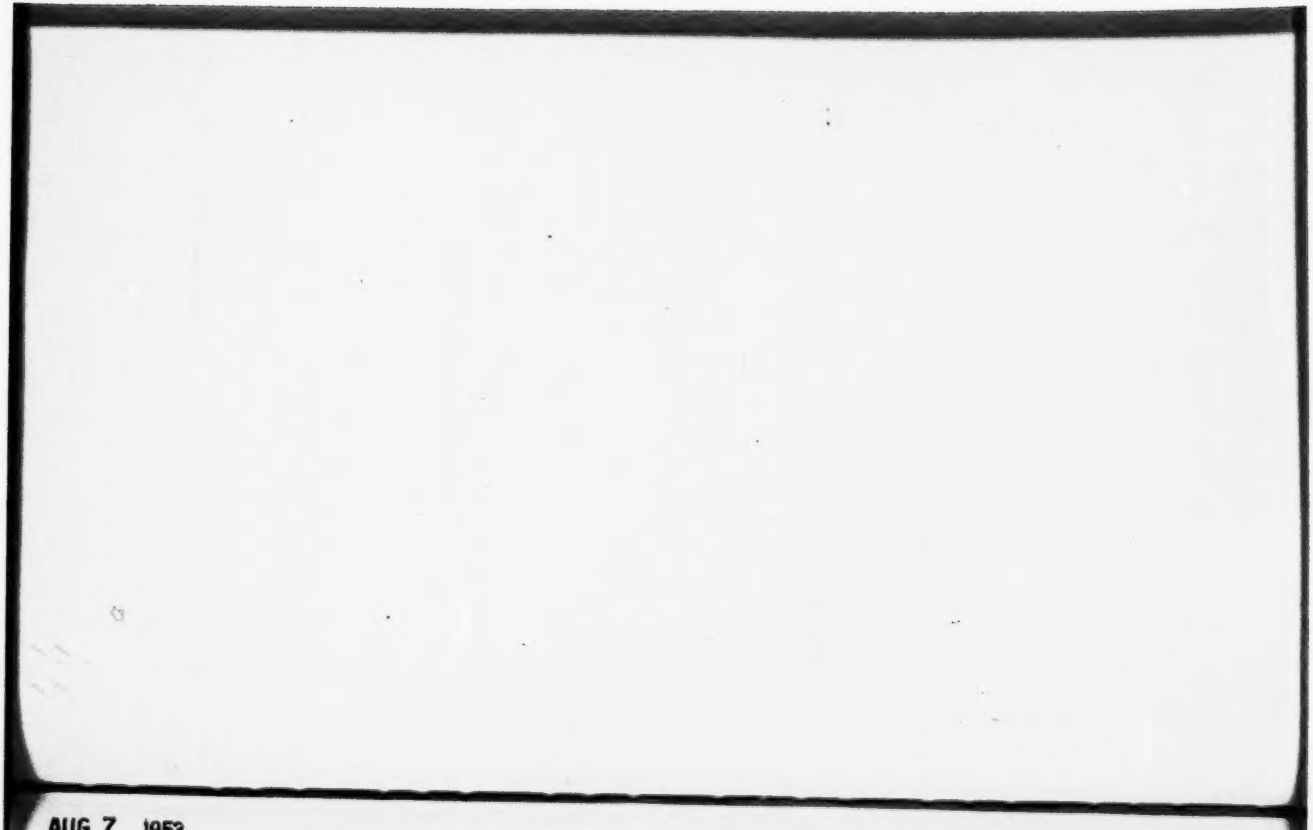
UNITED STATES OF AMERICA AND HAROLD R. LOVE,
Petitioners-Appellants Below,

vs.

DAVID W. ONAN ET AL.,
Respondents-Appellees Below.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT.

HAROLD R. LOVE,
P. O. Box 613,
Minneapolis 1, Minnesota.


AUG 7 1953

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AUG 7 1953

200098

Supreme Court of the United States

(To the United States Court of Appeals for the Eighth Circuit Nos. 14,234 and 14,291.)

No. _____.

UNITED STATES OF AMERICA AND HAROLD R. LOVE,
Petitioners-Appellants Below,

vs.

DAVID W. ONAN ET AL.,
Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show

SUMMARY STATEMENT OF MATTER INVOLVED.

1. This petition involves a judgment of the United States Court of Appeals, for the Eighth Circuit, at St. Louis, Missouri, rendered June 20, 1951, and a Petition for Rehearing, denied by Order of that court on July 11, 1951 (190 F. 2d 1), which reviewed orders of restraint and in-

junction of the District Court of Minnesota, wherein both courts (a) determined an affidavit of prejudice should be rejected (b) wherein the appellate court raised a contention not previously appearing, that the suit instituted under Section 232, Title 31, U. S. C. A., must be brought only by, or with, an attorney at law, authorized to practice in the District Court, which, as far as can be ascertained has never been thought of before in any court.

2. The complaint involves a showing of false and fraudulent claims against the United States, damages and forfeitures in the sum of $1,256,536.00, and possible judgment, in favor of the United States of $2,525,072.00, including an interest of Harold R. Love, as provided by Section 232, Title 31, U. S. C. A.

3. Your petitioners contend, the determinations shown in paragraph No. 1, next above, are without foundation in fact or law, are contrary to law, or void for want of authority, and in violation of the rights of petitioners.

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the judgment in question, the petition for rehearing denied in the court below; because of the Act of Feb. 13, 1925, Chapter 220, 43 Stat. 936, as amended, and Section 1254, Title 28 (NEW), U. S. C. A.

STATUTES AND CASES RELIED ON.

The cases and statutes believed to sustain jurisdiction are:

Cases.

Berger v. *United States*, 255 U. S. 22.
Hurd v. *Letts*, 152 F. 2d 273.

Statutes.

Section 144, Title 28, U. S. C. A.
Section 1654, Title 28, U. S. C. A.
Rule 17(a), F. R. C. P., Title 28, U. S. C. A.
Section 232, Title 31, U. S. C. A.

QUESTIONS PRESENTED.

1. Was the affidavit of prejudice, filed against Judge Gunnar H. Nordbye, sufficient, timely filed, and did it contain the certificate as required of counsel having an interest of record, as referred to in Section 144, Title 28, U. S. C. A.?

2. Must a suit authorized in the name of the United States, be instituted by an attorney at law, authorized to practice in the court in which brought, and not otherwise?

THE CASE BRIEFLY STATED.

1. The petitioners contend the determinations shown in paragraph No. 1 hereinbefore, under "Summary Statement of Matter Involved" were erroneous.

2. In view of Section 232, Clauses (B) (C) and (E) (2) of Title 31, U. S. C. A., Section 1654, Title 28, U. S. C. A., and Rule 17 (a) of the Rules of Federal Civil Procedure, for the U. S. District Court, the persons who brought the suit, have a statutory interest therein, and the

right to act solely as their own counsel as laymen, and conduct the suit personally, without an attorney at law, for themselves as well as the United States of America, in order to establish their interest therein.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT.

1. The lower court has decided important questions of federal law in a way in conflict with statutes made and provided relative thereto; in a way probably in conflict with an applicable decision of this court, and has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by a lower court, as to call for the exercise of this court's power of supervision.

2. These reasons are supported by the record, and as indicated in the opinion of this court in the case of *Berger* v. *United States,* 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481; Section 1654, Title 28, U. S. C. A., Rule 17 (a), F. R. C. P., Section 232, Title 31, U. S. C. A., and Section 144, Title 28, U. S. C. A.

POINTS RELIED ON—ASSIGNMENT OF ERRORS.

1. That the court below erred in rejecting the affidavit of prejudice, filed against Judge Gunnar H. Nordbye, for the said affidavit was sufficient, timely filed, and contained a certificate of those having an interest in said suit acting for themselves and the United States.

2. That the court below erred in ruling that this suit authorized by Section 232, Title 31, U. S. C. A., must be instituted only by, or with, an attorney at law, admitted to practice in the District Court.

PRAYER FOR WRIT.

Wherefore, your petitioners pray, that a Writ of Certiorari, under seal of this court, be directed to the United States Court of Appeals, for the Eighth Circuit, at St. Louis, Missouri, commanding said court to certify and send to this court, a full transcript of the record and proceedings of the said lower court, as designated by the parties thereto, had in Dockets Nos. 14,234 and 14,291, entitled United States of America, H. M. Roberts and H. R. Love, Plaintiffs-Appellants, vs. David W. Onan *et al.*, Defendants-Appellees, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that judgment herein of the said court of appeals, be reversed by this court, and for such other or further relief, as to this court may seem just and proper.

(Signed) HAROLD R. LOVE,
Petitioner, for Himself and the
United States of America.

Minneapolis, Minnesota.

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Supreme Court of the United States

No. 327.

UNITED STATES OF AMERICA AND HAROLD R. LOVE,
Petitioners-Appellants Below,

VS.

DAVID W. ONAN ET AL.,
Respondents-Appellees Below.

BRIEF

Supporting Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION OF THE COURT BELOW.

The Opinion of the United States Court of Appeals is shown in the Transcript of Record submitted [R. 48], the Order denying petition for rehearing [R. 62]. The Opinion and decree of the court of appeals is reported in 190 F. 2d 1.

JURISDICTION.

It is contended that the Supreme Court has jurisdiction to review the judgment in question and the Order denying

the petition for a rehearing, because of the statutory provisions and cases, set forth in the petition here at pages 2-3 which are hereby adopted and made a part of this brief. Substantial rights of petitioners are involved under Sections 231-232, Title 31, U. S. C. A.

STATEMENT OF THE CASE.

This has already been stated in the petition here, at page 1, under "Summary Statement of Matter Involved," and at page 3, "The Case Briefly Stated," hereby adopted and made a part of this brief.

POINTS—ASSIGNMENTS OF ERRORS.

These have already been stated in the petition here filed at page 4, and are hereby adopted and made a part of this brief.

ARGUMENT.

Point No. 1. The affidavit of prejudice met all the requirements, within the full letter and intent of Section 144, Title 28, U. S. C. A. The Appellate Court's Opinion does not show the text of the affidavit. The affidavit appears in the Transcript of Record [R. 1 (3-5)] and it, for convenience is reproduced here:

Affidavit of Prejudice.

Pursuant to Section 144, Title 28, U. S. Code, H. M. Roberts and H. R. Love, depose and state as affiants:

That they are the persons who brought the above entitled suit, pursuant to Section 232, Title 31, U. S. C. A., in name of the United States;

That affiants have a substantial interest in the successful prosecution of such suit;

That the matter is pending and has been before Judge Gunnar H. Nordbye upon motion made by and on the part of affiants, directed to the United States Attorney, based upon a claim of and showing of facts related to lack of due diligence on the latter's part, at which time Judge Nordbye denied such motion, overruling the same, subject to renewal at a later date;

That Judge Nordbye has a personal bias or prejudice against affiants and in favor of defendants in the suit, who are clients of an attorney at law, one Fryberger, an officer of this Court, but upon whom no service of summons and complaint in this suit has been made, no service upon any defendant having been made by the United States, for which the United States Attorney represents, in explanation thereof, that he considers the statute (232 T. 31 U. S. C. A.) provides a stay period of six months, within which no proceeding need be had:

That affiants state the facts and reasons for the belief that bias or prejudice exists are, that affiants have been informed and believe that Judge Nordbye, at the behest or instance of said attorney Fryberger, conferred with said attorney in the absence of affiants or representatives of the United States relative to matters related to certain interrogatories which had been served, and received by certain of defendants in this suit, pursuant to the provisions of the Rules of the

United States District Court, requiring answers by said defendants, that the purpose of said conference was to obtain advice and counsel of Judge Nordbye relative to the legal requirements relative to answering or not answering said interrogatories on the part of defendants receiving them, for the use of attorney Fryberger and said defendants, that as a result of such conference, advice and counsel received, defendants and all of them have failed to answer said interrogatories;

That, further, affiants aver, in a matter involving a suit under the same statute (232 T. 31 U. S. C. A.), a Judge of a United States Court was requested by one of the affiants undersigned, to advise in the absence of any defendant as to whether or not a certain thing or act could be done, or was prohibited, whereupon said judge refused to comment in any manner and referred affiants to the provisions of Section 454, Title 28, U. S. Code, as the reason for his refusal to comment or reply:

Affiants hereby certify that the herein stated affidavit is made in good faith.
September 5, 1950

H. M. Roberts
H. R. Love

Such affidavit alleges affiants had "a substantial interest" in the suit. It sets forth the personal bias and prejudice of the judge, the facts and reasons for the belief of existence of that bias and prejudice to be, that at the behest, or instance, of the defendants' counsel, alone with him, there was obtained from the judge, legal advice and counsel, relative to the *legal* requirements, as to answering

or not answering certain of the interrogatories served in the suit, for the sole purpose of the use of said defendants and their counsel as received from the judge which resulted in the failure to answer the interrogatories on the part of any defendant. Other orders of that judge [R. 1 (20)] have prevented the suit coming to an issue, he having relieved all defendants of any requirement of answer by quashing summons properly served. There is no denial of any part of the affidavit.

Such is a definite showing that the judge was practicing law, a considerable impropriety, culminating in prejudice to petitioners, and personally acting on the judge's part with bias in favor of defendants, to such an extent they all felt safe in refusing to reply to the interrogatories served under the Rules (Rule 33, F. R. C. P.). From this, sane, reasonable minds could only infer personal bias and prejudice of the judge.

The affidavit was filed September 6, 1950 [R. 1 (3)]. The next proceeding [R. 1 (20)] was had on September 28, 1950, when the judge issued an order, did not hear the Orders to Show Cause served the day before, with motion of defendants, but did hear their motion which was a part of said Order to Show Cause, issued and filed his order thereon of September 28, 1950 [R. 1 (20-21)]. Nothing appears in the Opinion of the appellate court which would indicate untimeliness of the affidavit, though the court, without ground or reason stated or finding of fact, concluded it was "untimely." It has been impossible to bring the case to issue or get it set for trial. Obviously the affidavit was timely.

The statute Section 144, Title 28, U. S. C. A., requires "certificate of counsel of record," that the affidavit is made in good faith. The affidavit states that requirement, and affiants were acting in their own interest and that of the United States of America under the statute (Sec. 232, Title 28) giving each a definite interest, had no other counsel than themselves, and acted as their own counsel, in their own interest.

This court in *Berger* v. *United States,* 255 U. S. 22, 41 S. Ct. 481, established the proposition that an affidavit of prejudice against a judge is subject to appellate review, and that subsequent orders of the judge against whom directed, are ineffective, if the affidavit be sufficient. In *Hurd* v. *Letts,* (1945) 89 Ct. App. D. C. 248, 152 F. 2d 121, it was stated:

> "* * * accordingly the question in all such cases is whether the affidavit asserts facts from which a sane, reasonable mind might fairly infer bias and prejudice of the judge * * *."

Point No. 2. To justify its ruling in Point 2, that a suit authorized by Sections 231-232, Title 31, U. S. C. A., must be instituted by an attorney at law practicing in the District Court, the court of appeals made only these representations [R. 53-54]:

> "* * * we do not think Congress could have intended to authorize a layman to carry on such suit as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with established procedure which requires that

only one licensed to practice law may conduct proceedings in court for anyone other than himself * * * It is unthinkable that Congress by this Act (Section 232) intended laymen to practice law * * *."

That court refused to consider that the affidavit set forth affiants were the persons who brought the suit, had a substantial interest therein, given by Section 232, Title 31, U. S. C. A., to them as the persons who instituted the suit, up to a possible maximum of one fourth of any recovery. No defendant, nor the court of original jurisdiction, raised the point.

Congress by law clearly disposes of this point, in the statutes cited below:

"Section 1654, Title 28, U. S. C. A. In all courts of the United States the parties may plead and conduct their own cases personally * * *."

"Rule 17 (a) of the Rules of Federal Civil Procedure for the District Courts of the United States.

Every action shall be prosecuted in the name of the real party in interest * * * or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; *and when a statute of the United States so provides, an action for the use and benefit of another shall be brought in the name of the United States.*"

"Section 232, Clause (B), Title 31, U. S. C. A. * * * such suit may be brought and carried on by any person as well for himself as for the United States, and the same shall be at the sole cost and charge of such person, *and shall be in the name of the United States*

* * * Clause (C) * * * *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court, after notice may allow, such suit may be carried on by the person bringing the same in accordance with Clause (B) above * * *.

Clause (E) (2). In any such suit when not carried on by the United States as herein provided, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in Clause (B) out of the proceeds of such suit or settlement of any claim involved therein, which shall be collected, an amount not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

CONCLUSION.

Your petitioners respectfully submit, that on the record now before this court, the showing made in this petition and brief, there are matters calling for the exercise by this court, of its power of supervision, to the end that a Writ of Certiorari, under seal of this court, be directed to the U. S. Court of Appeals for the Eighth Circuit, to certify and send to this court, the matter, cause and record, and that this court review the decision and judgment below, and reverse the same, and give such other or further relief, as to this court shall appear just and proper.

Most respectfully,

HAROLD R. LOVE,
Petitioner for Himself and the United States of America,

Minneapolis, Minnesota.

FILED
OCT 22 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 327

UNITED STATES OF AMERICA and HAROLD R. LOVE, Petitioners,

vs.

DAVID W. ONAN, et al., Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1951

No. 327

UNITED STATES OF AMERICA and HAROLD R. LOVE, Petitioners,

vs.

DAVID W. ONAN, et al., Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE RECORD

The record filed by petitioner Love in this Court includes (1) two identical records filed by him in two appeals in the court below, (2) a "supplemental" record filed by respondents therein, together with (3) a printed record of the further proceedings had in that court. The records filed below by petitioner Love will be referred to as "R.", the supplemental record filed by respondents as "Supp.". As the printed record of the subsequent proceedings in the court below is paginated to follow the supplemental record, it will also be referred to as "Supp.".

After service of the petition and record on respondents, respondents discovered that a material portion (R. 52) had been removed from all copies of the record

served on respondents. The portions of the record thus removed are printed as an Appendix to this brief.

OPINIONS BELOW

The opinion and order of the District Court quashing an affidavit of prejudice and striking the same from the record (R. 17-18) is unreported. The opinion of the court below (R. 48-59) is reported at 190 F. (2d) 1.

JURISDICTION

The judgment of the court below was entered on June 20, 1951 (Supp. 60). Petition for rehearing, filed June 26, 1951, was denied on July 11, 1951 (Supp. 62). The petition for writ of certiorari was filed on September 14, 1951. This Court has jurisdiction under Secs. 1254 and 2101 of Title 28, U. S. C.

QUESTIONS INVOLVED

On April 13, 1950, Petitioner Love and another layman named Roberts commenced an informer's action in the United States District Court, District of Minnesota, Fourth Division.[1] On May 6, 1950, the informers filed interrogatories. On August 9, 1950, the District Court, Chief Judge Nordbye presiding, denied the informers leave to control the prosecution of the action—the United States having made a timely appearance within the sixty days after commencement of the action as prescribed by statute. Thereafter, on September 6, 1950, the informers filed an affidavit of prejudice signed by themselves, against Chief Judge Nordbye, alleging as a show-

[1]For brevity, Love and Roberts will be called "informers."

ing of bias, that in their absence, the Judge had conferred with counsel for certain respondents concerning the interrogatories.

The District Court held that the affidavit was untimely and insufficient under Sec. 144 of Title 28, U. S. C. This ruling was affirmed by the court below on appeal from certain orders subsequently entered by the District Court.

The question presented is whether, under all the facts and circumstances disclosed, the affidavit was timely and sufficient and otherwise met the requirements of Sec. 144 of Title 28, U. S. C. A further question sought to be raised by petitioner Love—whether an informer's action may be conducted in court by a layman—need not be considered in this case, for reasons more fully set forth below.

STATUTES INVOLVED

Section 144 of Title 28, U. S. C., provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Sec. 231 of Title 31, U. S. C., authorizes suit for double the amount of damages sustained by the United States by reason of any false claim made upon the Government. Sec. 232, (B) and (C) provide:

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit; *Provided,* That if the United States shall fail to carry on such with due diligence within a period of six months from the date of appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by

the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

STATEMENT

On April 13, 1950, petitioner Love and Roberts, filed a complaint in the Fourth Division of the District of Minnesota, in the name of the United States, Civil No. 3291 in the files of that court (R. 52). The action was commenced pursuant to Section 232 of Title 31 U. S. C. authorizing an informer's suit based on alleged fraud practiced on the United States but giving the United States 60 days after notice of the proceeding within which to enter an appearance and sole power to carry on the action after such appearance, unless within six months from the date of its appearance (or such further time as the court may allow) the United States fails to prosecute the action with due diligence.

On May 6, 1950, informers filed interrogatories; the date of filing appeared in a portion of the record which was before the court below (R. 52), but has been deliberately removed from the copies of the record served by petitioner Love on respondents. We have reprinted the portion in the Appendix to this Brief (App.)

On June 12, 1950, within the sixty (60) days allowed by statute, the United States filed its appearance (R. 52; Supp. 14), and specifically reserved all of its rights to carry on the litigation.

By "application" filed July 29, 1950, and again by motion filed August 7, 1950 (R. 52; Supp. 14-21), the informers applied to the District Court for an order authorizing them to carry on the action, upon the ground that the United States had failed to prosecute the same with due diligence (Supp. 14, 20).

On August 9, 1950, Chief Judge Nordbye overruled the motion and, in an oral order duly recorded in the court's minutes on the same date (Supp. 21; R. 52), directed that "all future proceedings in this cause be stayed until the future order of this Court" (Supp. 21).

Thereafter, on September 6, 1950, informers filed an affidavit of prejudice against Chief Judge Nordbye (R. 3-5). The affidavit alleged that Judge Nordbye had a personal bias or prejudice against informers and in favor of respondents, and gave as "the facts and reasons for the belief that bias or prejudice exists" that Judge Nordbye had "conferred" with Mr. Fryberger, attorney for certain respondents "in the absence" of informers, "relative to matters relating to certain interrogatories which had been served, and received by certain of" respondents, and that the purpose of the conference was to "obtain advice and counsel of Judge Nordbye relative to the legal requirements relative to answering or not answering said interrogatories on the part of" respondents, and that "as a result of said conference, advice and counsel received, defendants [respondents] and all of them have failed to answer said interrogatories" (R. 3, 4). The affidavit was signed and certified only by informers Love and Roberts (R. 5), both of whom are admittedly laymen.

Informers thereupon proceeded to ignore the District Court's order of August 9, 1950. On September 13th and 19th, 1950, without leave of court, informers served garnishee summons dated September 13th on all of the five large banks in Minneapolis (R. 8, 14), and caused summonses and complaints to be served on certain respondents on September 19 (R. 14), and on others on September 25th (R. 8).

On September 28, 1950, the District Court entered an order quashing both the garnishee summons (R. 21) and the service of summons on respondents (R. 20-21), and staying informers from further intermeddling in the case during the time reserved to the United States to proceed with its prosecution (R. 22-23). Objection of informers that the court was without jurisdiction because of the affidavit of prejudice filed September 6, 1950 (Supp. 26) was overruled, upon the ground that the affidavit was insufficient and untimely, and not in compliance with the applicable statute (R. 17, 18).

Meanwhile, on September 7, 1950, and without any notice to the United States or respondents (R. 32, 33), informers commenced an action in the *Third Division* of the District of Minnesota, No. 1892 in the files of that court, by filing a complaint which is a duplicate of that previously filed in the Fourth Division of the same District except for slight and immaterial differences in the names of certain parties defendants (R. 32, 41). On October 20, 1950, notwithstanding the prior order of September 28, informers again caused garnishee summons, this time entitled in No. 1892, to be served on various banks, again impounding deposits of respondents amounting to hundreds of thousands of dollars (R. 31-32).

On November 8, 1950, and on motion of respondents (R. 29-34), the District Court entered an order consolidating actions Nos. 1892 and 3291; quashing the garnishee summons dated October 30, 1950; staying informers from taking any further steps or doing anything whatever in connection with No. 1892 or the consolidated case until the United States evidenced its intention not to proceed with the prosecution thereof (other than to present motions to the court for leave to carry on the same); and adjudging informers in contempt and ordering them to pay a fine on or before November 30, 1950, of $2,500.00 (R. 40-44). The order was entered over the objections of informers based on the ground, among others, that Judge Nordbye was deprived of jurisdiction upon the filing of the affidavit of prejudice on September 6, 1950 (R. 35-37).

On November 16, 1950, the United States filed a statement declining to appear in No. 1892 (R. 28), and withdrawing its prior appearance on No. 3291 (Supp. 40).

In affirming the District Court's orders of September 28 and November 8, 1950, the court below held that the affidavit of prejudice filed September 6, 1950, failed to comply with the requirements of Sec. 144, Title 28, U. S. C. The court concluded that, in the absence of any allegations in the affidavit as to when the alleged conference between Judge Nordbye and Mr. Fryberger was held, "we are warranted in assuming that it occurred soon after the filing of the interrogatories" on "May 6, 1950," while the affidavit of prejudice "was not filed until September 6, 1950, after the [District] court entered its order of August 9, 1950, denying appellants have to proceed with the prosecution of the action" (Supp. 53). The court further held that the allegations of the affidavit failed to charge bias or preju-

dice or even impropriety, in that "so far as can be gathered from the affidavit, the Judge may simply have answered some inquiry as to the proper procedure" (Supp. 53). Finally, the court below ruled that the term "counsel of record" as used in the provision of Sec. 144 of Title U. S. C. requiring a "certificate" of such counsel that the affidavit "is made in good faith", means "an attorney at law admitted to the bar of the court who has been counsel of record in the case", and that, as the certificate accompanying the affidavit of prejudice of September 6, 1950, was signed only by the informers Roberts and Love, both of them admittedly laymen, it did not comply with the statutory requirement (Supp. 53). This requirement, the court stated, was not removed by Sec. 232 of Title 31, U. S. C., in the view that Congress "must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself", and that "it is unthinkable that Congress by this Act intended to license laymen to practice law" (Supp. 54). For all these reasons the court below held that the affidavit of prejudice was "wholly insufficient and untimely" (Supp. 54).

ARGUMENT

The decision below was plainly correct. There is no conflict of decisions among the Courts of Appeals on any question considered or decided by the court below and no federal question of importance is presented.

I.

THE DECISION BELOW WAS PLAINLY CORRECT

A. The Affidavit of Prejudice of September 6, 1950, Did Not Comply With the Requirements of Section 144, Title 28, U. S. C.

The affidavit of prejudice filed by informers under 28 U. S. C. 144 was both insufficient and untimely. In such affidavit, while the facts alleged must be taken as true, "the reasons and facts for the belief the litigant entertains are an essential part of the affidavit and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States,* 255 U. S. 22, 33-34; *Foster v. Medina,* 170 F. (2d) 632, 633, cert. den. 335 U. S. 909; *Hurd v. Letts,* 152 F. (2d) 121.

The only allegation claimed to show bias on the part of Chief Judge Nordbye is that, in the absence of informers, he discussed with an attorney for certain respondents requirements relative to answering interrogatories filed by informers (R. 4). The allegations, on their face, do not even indicate any impropriety, much less "bias"; for all that appears, the Judge did no more than answer routine inquiries concerning time and procedure. Plainly, such facts, even if taken to be true, fall far short of disclosing any "personal bias" against informers or in favor of respondents. Cf. *Foster v. Medina, supra; Hurd v. Letts, supra; Cole v. Loew's Inc.,* 76 F. Supp. 872, rev'd on other grounds 185 F. (2d) 641, cert. den. 340 U. S. 954.

The affidavit, moreover, was untimely. It was filed after informers had sought and had been refused affirma-

tive relief, in particular, the right to maintain and prosecute the action by reason of alleged lack of due diligence of the United States (Supp. 14-21). No "good cause" was set forth in the affidavit for the delay, as expressly required by the statute. It affirmatively appears from the docket entries (removed from the record served by petitioner Love) that informers' interrogatories were filed on May 6, 1950 (R. 52, App.). For all that appears, the alleged conference with regard thereto may have taken place shortly after the interrogatories were filed and long before the District Court entered its order of August 9, 1950, denying respondents' leave to prosecute the action. Informers are "silent in respect of the matter". *Skirvin v. Mesta,* 141 F. (2d) 668, 672. The plain inference is that the filing of the affidavit was not prompted by the alleged conference between the court and counsel, but by the unfavorable ruling of August 9, 1950. Informers have thus failed to discharge their burden of showing good cause for delay in filing the affidavit. *Skirvin v. Mesta, supra; Scott v. Beams,* 122 F. (2d) 777, 789, cert. den. 315 U. S. 809; *Eisler v. United States,* 170 F. (2d) 273, cert. den. 338 U. S. 883; *United States v. Parker,* 23 F. Supp. 880, 886.[2]

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[2]There is no force in petitioners' contention that the case was not and could not be set for trial, and that the affidavit was therefore timely (Pet. Br. p. 5). The statute requires that an affidavit of prejudice be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard," absent a showing of good cause for failure to file within such time (28 U. S. C. 144). The action was commenced on April 13, 1950. Under the civil rules of the District Court of the United States for the District of Minnesota, general terms in the Fourth Division commence the first Tuesday in March and the fourth Tuesday in September; special terms (for hearing of motions, etc.) in the Fourth Division are held on the second Monday of each month except August. The case was never set for trial, but "hearing" was held on August 9, 1950, on petitioners' motions of July 29 and August 7, 1950, for leave to carry on the action. In so far as appears, the affidavit of prejudice could

Finally, the affidavit fails to comply with the requirement of Section 144, that it "shall be accompanied by a certificate of counsel of record, stating that it is made in good faith". Admittedly, neither Roberts nor Love who signed the affidavit are members of any bar, and are not even attorneys at law. And the phrase "counsel of record", it is settled, means "an attorney at law admitted to the bar of the court who has been counsel of record in the case. One who is not a member of the bar cannot be counsel of record even though the record on its face may show he had undertaken to appear as counsel." *Currin v. Nourse, et al.* (C. C. A. 8), 74 F. (2d) 273, 275, cert. den. 294 U. S. 729; *Mitchell v. United States,* 126 F. (2d) 550, 552, cert. den. 316 U. S. 702, rehearing denied 324 U. S. 887.

The reasons for such requirement are obvious. As the facts alleged in the affidavit must be taken as true, a certificate of an attorney at law is a necessary safeguard against abuse of the privilege to file such affidavit, "founded on the assumption that a member of the bar or counsel of record will not indulge in reckless disregard of the truth * * *." *Mitchell v. United States,* supra, at 552. The lower federal courts have uniformly so held. *Morse v. Lewis,* 54 F. (2d) 1027, 1032, cert. den. 286 U. S. 557; *Cuddy v. Otis,* 33 F. (2d) 577, 578; *Currin v. Nourse,* supra, at 275; *Ex parte Fairbank Co.*, 194 Fed. 978. The dangers of dispensing with such safeguards are forcefully suggested by the conduct of in-

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have been filed more than ten days prior to the hearing of August 9. Moreover, the statutory requirement that the affidavit be filed "not less" than ten days before the term, does not dispense with the independent requirement of due diligence; the affidavit must in any event be filed "as soon as the disqualifying facts are known or good cause shown for delay." **Chafin v. United States,** 5 F. (2d) 592, 595, cert. den. 269 U. S. 552; **Bishop v. United States,** 16 F. (2d) 410, 411; **Bowles v. United States,** 50 F. (2d) 848, 851; **United States v. Parker,** 23 F. Supp. 880, 886.

formers in this case, including petitioner Love's deliberate removal of a material portion of the record from the copies served on respondents, and his utter disregard of the orders of the District Court.

The rule requiring a certificate of an attorney at law is in no wise affected by the provisions of Sec. 232 of Title 31 U. S. C. authorizing informers' actions. Assuming, contrary to fact, that the United States were only a nominal party and the informer the real party in interest in proceedings under Section 232, the informer would still be governed by the same requirements as any other private litigant in filing an affidavit of prejudice under Sec. 144 of Title 28 U. S. C.

Whether a layman may prosecute an informer's action at all without employing counsel to conduct the action in court is a separate question considered below.

B. The Informers Were Not Authorized to Conduct the Action in Court; This Question, However, Need Not Be Considered in the Present Case.

The United States made a timely appearance on June 12, 1950 (R. 52; Supp. 14) and did not withdraw its appearance until November 16, 1950 (Supp. 40), after the second of the orders appealed from was entered on November 8 (R. 40-44), and two months after the affidavit of prejudice was filed on September 6 (R. 3-5). Prior to November 16, 1950, the informers were not authorized to conduct the action in court, in person or at all. The statute expressly provides that, if the United States enters a timely appearance, the suit "shall be carried on solely by the United States" unless, within a prescribed time it "fail to carry on such suit with due diligence." (31 U. S. C. 232 (C)). There was no showing

of lack of due diligence on the part of the United States, as the District Court ruled on August 9, 1950 (Supp. 21; R. 52).

Were it necessary to consider whether the lay informers could conduct the action in person after the government's withdrawal of its appearance, the conclusion would be the same. The statute requires that the action be brought "in the name of the United States" (31 U. S. C. Sec. 232 (B)). Even prior to the amendment of 1943, which for the first time permitted the United States to take control of this action after due notice, the attorney retained by the informer was always regarded as the "attorney of the United States." *United States v. Griswold,* 5 Sawyer 25, 26 Fed. Cas. No. 15,266, p. 44; *Bush v. United States,* 13 Fed. 625, 629.

As the United States is thus the party plaintiff, the lay informers may at no time conduct the action in court save through counsel, in view of the "established procedure", to use the language of the court below, "which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself" (Supp. 54). Such is certainly the procedure in the District of Minnesota. Rule 1 of the civil rules of that court precludes any person from arguing any question of law or fact "unless duly admitted to practice" in that court, "except in his own behalf or by special permission of the Court", a rule which conforms to the "established procedure" in all jurisdictions (Supp. 54). A limited exception is made for "Government Attorneys", who are permitted to represent the United States if they are admitted to practice in any District Court.

Section 1654, Title 28, U. S. C., invoked by petitioners, does not provide otherwise. Section 1654 (only partially quoted by petitioners, Pet. Br. p. 7), directs that proceed-

ings be conducted "personally or by counsel, as, by the rules of such courts (of the United States), respectively, are permitted to manage and conduct causes therein".

These requirements are in no wise affected by Sec. 232 of Title 31, U. S. C. The statute was originally enacted "to stimulate action by private parties should the prosecuting officer be tardy in bringing the suits" (*United States ex rel. Marcus v. Hess,* 317 U. S. 537, 547). Nothing in its terms or policy even remotely suggests an intention to regulate the requirements, governed by applicable rules of court, for the conduct and argument of cases in the federal courts.

There is no occasion, however, to consider at this time whether a layman may appear as counsel for the United States in an informer's action under any circumstances. While the language of the court below is broad in terms, the court actually decided only that a certificate of a layman is not sufficient for the purpose of Sec. 144, Title 28 U. S. C., governing the requisites of an affidavit of prejudice. It will be time enough to consider the broader question when and if a ruling is made that petitioner Love is not qualified to appear as counsel in any further proceedings in the action now pending in the District Court below.

II.

THERE IS NO CONFLICT OF DECISIONS AND NO FEDERAL QUESTION OF IMPORTANCE IS PRESENTED

Only two cases, *Berger v. United States,* 255 U. S. 22, and *Hurd v. Letts,* 152 F. (2d) 121, are cited in petitioners' brief, and then only for the uncontested propositions that a ruling on an affidavit of prejudice is subject to judicial review, that an affidavit is sufficient if it asserts facts from which bias and prejudice may be fairly inferred, and that upon the filing of a timely and sufficient affidavit the Judge concerned may proceed no further (Pet. Br. p. 6). No case is cited, and we have found none, which holds or even intimates that an affidavit filed in the circumstances of this case is timely, or that an alleged conference between the court and opposing counsel, however irregular, evidences personal bias, or that a certificate of a layman is sufficient to meet the requirements of Sec. 144, Title 28, U. S. C.

Nor is any federal question of importance presented. The question whether due diligence has been shown in filing an affidavit of prejudice, as well as the further question whether the facts alleged in such affidavit evidence personal bias against one party or in favor of another, both turn on the facts of the individual case. The federal courts have uniformly held that a member of the bar must sign the certificate of good faith accompanying an affidavit of prejudice under Sec. 144 of Title 28, U. S. C.; there are no cases opposed. Finally, the question whether the United States may be represented in court by a layman in a qui tam action, even if it may properly be considered in this case, is one of no general importance. The interests of the United States are ob-

viously adequately protected by the United States Attorney in any case in which the United States has entered an appearance; those cases in which the United States has failed to make an appearance (or withdrawn such apearance once made), in conformity with the provisions of Sec. 232 (C) of Title 31, are presumably limited to those in which the Government has concluded that the claim is without merit. Should any meritorious action be left to private control, whether through lack of due diligence on the part of the Government or otherwise, there is no reason to believe that an informer would have any difficulty in retaining private counsel to prosecute the action. Certainly, it is improbable that a layman could successfully prosecute a complicated fraud claim without advice of counsel. Actions prosecuted under such lay control thus could hardly advance the interests of the United States in detection of frauds against the Government, which is the purpose of the limited statutory privilege conferred by Sec. 232. *United States ex rel. Marcus v. Hess,* supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

52

DOCKET ENTRIES

Civil No. 3291

April 13, 1950—Filed Complaint.

May 6, 1951—Filed Plaintiff's Interrogatories.

June 12, 1950—Filed Notice of Appearance on behalf of United States of America pursuant to Title 31, U. S. C. A. 232 (c), with demand that notice of all proceedings be served upon U. S. Attorney.

July 17, 1950—Filed Praecipe for issuance of Summonses and issued same.

July 27, 1950—Filed Notice to United States Attorney with affidavit of service.

July 29, 1950—Filed Application to the Court for an Order authorizing persons who brought suit to carry on same, etc.

Aug. 7, 1950—Filed Motion for an order that the U. S. through its U. S. Attorney in charge of the suit has failed to carry on, and that the persons who initiated this suit may carry on in accordance with Section 232 (B) of Title 31, U. S. C. A., and that Burdette Bergman be appointed specially in lieu of U. S. Marshal to serve summons and comp-

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1951

No. 327

UNITED STATE OF AMERICA
and HAROLD R. LOVE,
Petitioners,

DAVID W. ONAN, et al,
Respondents

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The decision below was plainly incorrect in relation to the two points of error relied on (Pet. 4-5), and their importance is shown in their conflict with statutes and departure from the usual course of judicial proceedings (Pet. 4).

I

THE DECISION BELOW WAS PLAINLY INCORRECT

A. The Affidavit of Prejudice of September 6, 1950, Did Comply with the Requirements of Section 144, Title 28, U.S. C.

The respondents assume that the statute (Sec. 144 Title 28, U.S. C.) requires that the affidavit of prejudice be filed "not

less than ten days before the beginning of the term at which the **proceeding** is to be heard" then erroneously claim that means before any "special term" for the hearing of motions (Resp. Br. 11, bottom). That such proposition is falacious, hardly need be pointed out. The "proceedings" referred to, can only be the matter of hearing the complaint would could, in no event be before the "fourth Tuesday in September, 1950". The affidavit of prejudice was filed September 6, 1950 (R. Secs. 1-2, pp. 3-5), could not be filed until the affiants knew of the facts ascertained, upon which it is based, and in fact it was filed as soon as they knew those facts, though the record does not show precisely when the knowledge was obtained.

The affidavit alleges the interrogatories were served. The record does not show when they were **served** but does show they were filed May 6, 1950. The record does not show when the conference took place and it could as well be assumed it took place a few days before the affidavit was filed as at any prior time, at which conference counsel for the Onan Group of defendants, R. H. Fryberger, the only defendants being in that group who were **served,** obtained "legal advice and counsel" (R. Secs. 1-2, pp. 4). Rule 33 F.R.C.P. provides defendants shall have 15 days after **service** within which to respond. The affidavit alleges defendants acted on that judge's advice and counsel given and did not answer or respond a conclusive indication of such personal bias and prejudice, that affiants and any reasoning mind could only conclude, and affiants did conclude, it would be waste of time to attempt to obtain from that judge the order provided by Rule 37 F.R.C.P. to compel answers to the interrogatories. What could be of greater prejudice in making a showing of bias to the detriment of the United States' and petitioner's interest in the suit, would be difficult to imagine.

There is in fact no basis for any assumption that the conference with such judge took place shortly after the interrogatories were filed (R. Sec. 5, p. 11) which was May 6, 1950.

As respondents admit (Resp. Br., p. 11, bottom) no special term for hearing of motions existed in August, 1950, so the motion heard August 9, 1950 (R. Secs. 1-2, pp. 53) was not heard at any special term. Petitioner was in no way, nor were affiants influenced to file the affidavit of prejudice because of

any hearing or matter involved on August 9, 1950 and could not under rulings related to such matters in appellate courts base any facts in an affidavit on adverse rulings of the court, such matter being precluded for use in an affidavit of prejudice.

Further, the "proceeding" referred to in the statute, petitioner submits can only mean the "hearing" of the suit by trial, and the record shows no answers were served, or filed, so there could be no note of issue, or setting of the matter for hearing, particularly as Judge Nordbye of the District Court had by Orders (R. Secs. 1-2, pp. 20-21 and 42-43) quashed (without power, jurisdiction or authority) all services of Summons in the main action, made by the United States Marshal, and ordered the Marshal not to serve any other Summons in the main actions in his hands for service in Civil Action 1892 (R. Secs. 1-2, pp. 42-43) and had unconscionably and unlawfully, granted, without motion, extended time, unlimited, to all defendants "served with a Summons" in said action, in practical effect negating Rule 4 F.R.C.P. by judicial fiat.

If the statute (Sec. 144 Title 28 U.S.C.) be construed to refer to "hearing" at a special term, it would be nugatory, as obviously a party or counsel learning of facts upon which an affidavit of prejudice might be filed, conclusively showing prejudice and bias of a judge, a day or two before a special term day set, or after such special term day, could not file such affidavit ten days before that special term day. On the record here, there can be predicated no claim or showing, that affiants were not diligent in filing the affidavit, and the statute requires no more diligence than to file it not less than ten days before the hearing at which the case is to be tried, which the record shows here, has not been possible, because of the arbitrary acts shown in the record of the prejudiced and biased judge, noted herein above.

The respondents did not raise the question of lack of any diligence in any court below, and therefore can not raise any such question here, though petitioner submits it is not present in fact on any showing.

The petitioner's brief in support of the petition for a Writ of Certiorari and the affidavit of prejudice in its context speak eloquently of the facts showing bias and prejudice, and the illegal practice of law, by the judge against whom the affidavit

of prejudice was filed. There is no inference in such affidavit that such judge limited his "legal advice and counsel" given to attorney Fryberger for the use and benefit of the Onan group of defendants (which attorney certainly knows the Civil Rules of Practice referred to) to answering routine inquiries, concerning time and procedure and it is submitted that might well be said to be the practice of law contrary to Section 454 Title 28 U.S.C. for the benefit of the defendants (R. Secs. 1-2, pp. 3-5).

Counsel for respondents and the appellate court, would have this court believe no more is shown, but the affidavit speaks for itself (R. Secs. 1-2, pp. 3-5) and Petitioners' Brief pp. 2-4.

B. The Persons Including This Petitioner Were Authorized to Conduct the Action in Court.

The reference in respondents' brief to this point, i. e., that the appellate court has ruled (R. Sec. 5, p. 12) that a layman may not appear in a suit to proceed in his own interest, without an "attorney at law" to practice in the District Court, is fully covered in the Petitioner's Brief to which may be added:

1. The statute (Sec. 144 Title 28 U.S.C.) refers to certificate "of counsel" not "attorney at law". Congress knew the difference and did not specify "attorney at law" admitted to practice in the court in which appearing, and knew corelated statutes and rules provided a lay person was authorized to act in his own interest as his own "counsel".

2. On page 13 of respondents' brief an assumption, wholly falacious is presented, that at least by inference, a private "litigant" is governed in filing an affidavit of prejudice in such manner that he must get an attorney at law to make appearance for that purpose and the attorney at law is then the only person who can submit such affidavit.

3. The error in such assumption is sharply pointed up, when it is considered that such question was not raised in the lower District Court, nor by defendants in the appellate court and that by the Rules of Practice of the Tax Court, wherein litigants who are laymen, in their own interest, and not attorneys at law, are authorized by Rule 3 of such Tax Court, to practice for himself or a partnership of which he is a member and for a corporation, when a lay person not an attorney at

law is an officer of a corporation litigant. That in cases where a field of specialized knowledge is most evident and fraud involved in many such suits on the United States, requiring great legal skill. Would respondents or the courts contend that such a litigant not an attorney at law could not properly file the affidavit of prejudice if he so desired in such a case merely because he was not an attorney at law admitted to practice in such Tax Court? Furthermore certified public accountants who are not attorneys at law are authorized to practice in such Tax Court with the same privileges as attorneys at law for their clients Would it be contended they could not file affidavit of prejudice otherwise not objectionable?

4. There is no support in the record and matter here, for the statement on page 17 of the respondents' brief that there would be no difficulty in retaining private counsel to prosecute the action or that laymen could not serve the interest of the United States in the detection of fraud and the prosecution thereof in a civil suit for recoveries. In fact the files and records in the District Court (but not in the record before this Court) if this Court cares to examine it, show affidavits of the persons who brought the suit and one of counsel for the Griswold Group of defendants, Benedict Deinard, that after many months of effort by this petitioner here, and many attorneys at law contacted, none of such could be induced to enter their appearance in the cause, giving as their grounds for refusal and no other, that they feared improper reprisals and personal damages would result if they did make appearance, on the part of defendant Frank W. Griswold and Benedict Deinard, his counsel, who in his affidavit and personally before the court and otherwise each, said Frank W. Griswold and Benedict Deinard, in the Federal Court Building, Minneapolis, Minnesota and the office of said Deinard, made at various times improper threats to effect the personal injury of this petitioner and one such attorney, who was admitted to practice in the District Court in question, who might otherwise (and so stated) have been willing to record his appearance, if not so personally threatened by said attorney Benedict Deinard with prosecution if he did so in the office of said Deinard and elsewhere, at one time actually before the Court, and a judge thereof.

5. The records of the United States show this petitioner has

had a legal education, training and experience of many years, in several colleges, including college legal training given in schools conducted by the U. S. Treasury and War Departments. For many years before World War II and during all of that war, petitioner acted as legal and accounting advisor, in the specialized field involving this lawsuit, prepared cases for trial for U. S. Attorneys, assisting under special official assignments to the Department of Justice in invesigation of fraud and false claims and representations on the part of persons against the United States, and involving collusion of the precise type shown in the complaint in this action, acted as advisor to Contract Officers in such matters and on special assignments officially made by the War Department, assisted in preparing the cases for prosecution with representatives of the Federal Bureau of Investigation upon their specific request, in many such cases as involved here. Petitioner for the United States frequently acted as advisor in the field of specialized law, related to the Contract Settlement Act of 1944 and the Joint Termination Regulations thereunder in fraud and collusion matters found to be suspect thereto, and as instructor in relation to such law and regulations for commissioned, non-commissioned and warrant officers of the War Department, has presented fraud cases to Grand Juries, as representative of the United States, in all of which latter criminal prosecutions there were obtained indictments of those accused. Petitioner served three years and over as an Internal Revenue Agent in difficlut cases involving fraud and related matters. Petitioner during World War II was assigned as fraud investigator in a supervisory capacity in the employ of the United States on the false and fraudulent termination of contract claims of the notorious Garsson Brothers (Batavia Metals Company) 1945-1946, the Brewster Aeronautical Corporation-Hayes Mfg. Corporation-Miranda scandals, involving millions of dollars—1942-1943, has testified in fraud and bribery matters before the Committee of Congress at the special request of the Truman War Frauds Investigating Committee of the U. S. Senate. Petitioner's employment by the War Department in 1945-1947 involved, exclusively, in a supervisory capacity, the presentation of legal and accounting matters, for which he was sent to school by the War Department and specially trained for that purpose, in 1945, for the presentation of fraud, collusion, and the civil liabilities relat-

ing thereto, of precisely the type involved in the lawsuit here, for the protection of the interests of the United States and in cooperation with U. S. Attorneys and representatives of the Federal Bureau of Investigation, and the legal staffs of the War Department, acted as advisor in legal and accounting matters to Colonels of the Inspector General's staff of the U. S. Army, in matters solely involving fraud, false claims and collusion investigation and the preparation of the facts related thereto, interviewing of witnesses, preparing their testimony, and the reporting thereon. Petitioner was for several years half owner of a school, teaching law and accounting principles related to commerce, and acted as instructor in the course on tax laws, and procedures, and was before that, instructor in charge of a school conducted by the U. S. Army in France, for Army adjutants for the General Staff.

6. The respondents stated inference (Resp. Brief, p. 17) that the Government has concluded the claim is without merit, may be noted is without a shred of support in the record. It might be noted that meticulous detail of fraud, falsity and collusion, is shown in the complaint in the record here. (Rec. Sec. 3, pp. 1-13).

7. Trial of this lawsuit can readily determine that question. If the interrogatories in point and the requirements for answers thereto were met by the orderly procedures with responses to the Summons in the main actions and had been required as provided by law, and not by ORDERS of the prejudiced judge emasculated by judicial fiat, petitioner assures this Court, that by now, false claims, fraud and collusion, as alleged in the complaint would be a matter of record proof in the District Court, with appropriate recovery for the United States Treasury an accomplished fact.

II

A. Deceit in Respondents' Brief and the Record.

The respondents, on pages 1, 5, 11 and 13 of their Brief, repeat over and over, a patently false assertion purposely designed to prejudice the Court improperly, by asserting petitioner removed page 52 of the records served on respondents' counsel, consisting of a few docket entries printed.

This petitioner denies he removed, "deliberately" or otherwise, from any of the four copies of the Record, in each appeal numbered 14,234 and 14,291 below, pp. 51-52 of each. This Court can see from examination of its copies, filed with the Supreme Court, as certified by the Clerk of the Appellate Court, that nothing was "removed". It would be obviously impossible to "remove" page (R. 52) in all four instances without perforce removing page 51 (R. 51) as page 51 is on the reverse side of page 52 (R. 52). Not only would there be no purpose in omitting those two pages, duplicated four times as served on respondents' counsel, and shown in two places in the indexes of the two copies served, but that part of Docket Entries referred to, are of no importance nor materiality in the matters involved in this petition, and are ordinarily no part of any printed record, but were actually inserted in the record, as printed for the appellate court below, because the honorable E. E. Koch, clerk of that court, suggested it be done.

It is the same printing by copy certified from the court below as served, and is duplicated in Sections 1 and 2 of the Record before the Supreme Court, because the appeal contained two docket numbers, 14,234 and 14,291, the same record being used in each appeal, probably there, and here, unnecessarily duplicated, as one copy would have sufficed.

At least one of respondents' counsel does not hesitate, under oath, in these proceedings to make false representations, as petitioner submits he has done in his Brief here, by misrepresenting there was deleted record page (R. 52), for the purpose of improperly prejudicing this Court, with a claim petitioner is a layman. How could they know what was deleted if it were not there? See their APPENDIX Page 18 of their Brief. If the page (R. 52) was "removed" how would counsel know what was on it. The Court can see its 10 copies were not deleted.

Counsel R. H. Fryberger falsified the record in the District Court below appearing here in this Court (R. Secs. 1-2, pp. 46). That portion of the record before this Court shows that counsel Fryberger and Judge Gunnar H. Nordbye of the District Court, proceeded exparte, on the affidavit of said Fryberger on December 1, 1950, filed December 1, 1950, sworn to December 1, 1950, with Clerk's certificate attached thereto (R. Secs. 1-2, pp. 46 and 61) which falsely states:

"...that this affidavit and the Certificate hereto attached and herewith made and presented to the Court **in support of a Motion of the Court,** for an Order directed to the United States Marshal to commit the said H. R. Love and H. M. Roberts to the jail of Hennepin County, State of Minnesota, to be there confined as provided for in said Order of said Court, bearing date of the 8th day of November, 1950, until said fine be paid or until further order of this Court.

SWORN TO December 1, 1950.

(s) R. H. FRYBERGER

(The above affidavit was not served on any party to the Actions).

Said Fryberger knew well there was no **Motion of the Court for any Order,** and that the statement was false, and the records of the court showed conclusively that there was no motion of the Court, in which matter Fryberger could submit that affidavit. Further he well knew that he had no interest in the matter, as attorney or counsel and that none of his clients had any interest therein whatever. (R. Secs. 1-2, pp. 29-34) and that the matter of contempt of court alleged, related solely to the clients of counsel Benedict Deinard, who represented solely the Griswold Group of defendants, Fryberger not being counsel or representing any defendant but those of the Onan Group, though Fryberger deceitfully inserted his name on the motion papers (R. Secs. 1-2, p. 31) of Attorney Benedict Deinard.

There was no supporting affidavit from any client of counsel Fryberger, nor from Fryberger, whose clients were not involved in the matter of the alleged contempt and fine. The only support, if support there be, came from no client of counsel Fryberger, nor any defendant involved, but was solely purportedly supported by "affidavit" of Benedict Deinard (R. Secs. 1-2, pp. 31-34) and not otherwise, dated November 3, 1950, the same day the purported hearing was held, on the alleged contempt citation (R. Secs. 1-2, pp. 18-40). It can be noted from the record of that hearing (R. Secs. 1-2, pp. 38-40), that no client of Fryberger, nor Fryberger, were involved, the only testimony, on the purported contempt citation coming from defendant Frank W. Griswold, claimed solely to involve Griswold. There was no other testimony. None of the Gris-

wold Group of defendants are clients of counsel Fryberger, but are solely of counsel Benedict Deinard. The record (R. Secs. 1-2, pp. 9-17) shows that counsel Fryberger represented solely the Onan Group of defendants, and (R. Secs. 1-2, pp. 7) that the purported contempt citation related solely to the Clients of counsel Deinard and that (R. Sec. 5, p 13) as the appellate court's opinion states "so far as appears (the contempt citation related to clients of Fryberger in the Onan Group) has not been acted upon."

Clearly, from the record before this Court, it can be seen that counsel Fryberger not only deceitfully appeared in a matter that neither he nor his clients had any interest, but falsified under oath for that purpose, and acted as a mere interloper and stranger to the proceeding, ex-parte, without notice to adverse party or parties, nor any service of his affidavit, nor existence of any motion on the part of the Court or anyone else, and deceitfully and improperly obtained a vicious order of the Court (R. Secs. 1-2, pp. 61, Docket entry of Dec. 16, 1950-Order of Commitment) issued by Judge Nordbye, against whom the affidavit of prejudice in question was filed on September 6, 1950 (R. Secs. 1-2, pp. 3-5) and with whom previously said R. H. Fryberger had so successfully conferred and received legal advice and counsel that his clients in the Onan Group of Defendants could safely fail to respond to the interrogatories served.

B. Federal Questions of Importance Are Presented.

1. Lack of any diligence on petitioner's part is nowhere shown in the record, nor a point involved here.

2. Lack of diligence required by Section 232 of Title 31 U.S.C. may well appear from the record before this Court as it stands, on the part of the U. S. Attorney and the Department of Justice, and it is clear they were tardy in bringing any action, criminal or civil in relation to the matters set forth in the complaint (R. Sec. 3, pp. 1-13).

3. In the matters referred to on page 8 hereof to the effect that this petitioner has presented fraud cases to Grand Juries, as representative of the United States wherein criminal indictments were obtained, it might well be further stated, to show the importance of this situation, that petitioner was

the only witness before those grand juries while in the employ of the United States. The same office of the U. S. Attorney was involved in those particular matters in obtaining the indictments. The same office in the larger of the cases, failed completely to proceed to trial in the criminal indictment and that same court never called that matter for trial. Further in the same matter the Department of Justice was so tardy no civil action to recover any sum related to the fraud and false claim was ever instituted by the Department of Justice nor anyone else, not a dime was recovered of the moneys the Treasury was defrauded of, and the bond under which the defendant was held (extraordinarily small) was never released, and the civil liability became outlawed, and barred by the applicable statute of limitation, all while the defendant was perfectly able financially to foot the civil liability, never asserted.

4. In the matter before this Court now, after the filing of the suit, the Federal Bureau of Investigation records show their agents made (R. Secs. 1-2, pp. 16) an extended investigation to develop proof in the matter for trial; and shortly before the U. S. Attorneys filed their withdrawal of their appearance in Civil 3291 and statement that they would not appear in Civil 1892, a representative of the Federal Bureau of Investigation delivered to this petitioner an admonition or implied threat by stating that "either this petitioner or the U. S. Attorney better proceed to try this lawsuit". The duplicate complaint in this matter filed in the Northern District of Illinois, at Peoria, Civil P-1211, instituted there, from which court, services were made on certain of the same defendants named in Illinois and New York states, because jurisdiction could not be obtained on them in Minnesota by proper service personally, referred to in the record (R. Secs. 1-2, pp. 16-17), is still pending, but the U. S. Attorney filed therein, a notice that he would not appear, gave no reason for his notice, and certainly failed to indicate any inference of any lack of merit in the lawsuit there or anywhere else where filed and served, No court has quashed the services made on defendants out of the Illinois venne, but no defendant has bothered to serve or file answer in that venue, and several are in complete default. No question there has been raised of the persons who brought the suit being laymen, but for obvious reasons, under the decision in the Eighth Circuit Court of Appeals (R. Sec. 5, 49-

50, 53-54) those persons fear to proceed, unless this Court shall determine a layman may proceed, as such, in prosecuting these suits, though there the United States affirmatively filed its notice that it would not appear in the Illinois venue, as it likewise did in the venue of the Third Division, of the Minnesota District Court, Civil 1892, wherein it made through the U. S. Attorney no other appearance nor filed any other paper whatever (R. Secs. 1-2, pp. 60, Docket Entry of November 16, 1950). See also Sec. 3 of Record Supp. of Appellees and wherein the complaint practically pleads the evidence related to the fraudulent million-dollar treasury raid so far not denied.

5. In this connection petitioner shows in the APPENDIX at the end of this Brief, a portion of the Record (not included in the record certified to this Court), which was filed July 30, 1951, after the decision made in the appellate court. In relation to the showing made in such APPENDIX petitioner states that Mr. Roberts was induced after personal conference by him alone with defendant Frank W. Griswold, to appear for defendants and practice law, though Roberts is a layman, not an attorney at law, as shown in such APPENDIX, before Judge Nordbye, who countenanced such appearance of Mr. Roberts, representing defendants, now as their counsel, made no objection thereto, and though both counsel R. H. Fryberger and Benedict Deinard were present at such appearance while Roberts practiced law **for them** before the Court, they entered no objection whatever to such irregular and improper actions and procedings, on his (Robert's) part. As can be seen from the matter set forth in the APPENDIX here, Judge Nordbye emphasized the appearance of Roberts for the defendants by recording (App. p. 18):

> "THE COURT: In any event I think the record may indicate Mr. Roberts has personally appeared and has joined with the defendants in their motion to dismiss these proceedings...."

6. The important federal questions involved are the conflict in the appellate court's decision with Acts of Congress and the Rules of the United States District Courts, pointed out in the petitioner's Brief, and as shown in the two assignments of error (1) that the appellate court sustained the lower court in rejecting an affidavit of prejudice, that was quite sufficient

and timely, filed by the only counsel the United States or the persons who brought the suit in its and their interest had, and (2) that a layman should be and was intended by the statute authorizing the suit, layman or not, to be the representative of the United States and counsel for himself in all respects in his and its interest, under Section 232 Title 31 U.S.C.; this latter being of extreme importance, for if he cannot, as the statute was designed, as the respondents assert in their Brief, page 15, "to stimulate action by private parties should the prosecuting officer be tardy in bringing the suits" the statute as here protects the public Trasury in no respect, from the unscrupulous horde, increasingly large, to judge from the matter currently appearing in the public press.

7. Copies of this Brief have been served as shown in the proofs of service, on the counsel for the respondents, the Attorney General of the United States and the Solicitor General.

Petitioners submit the petition for Writ of Certiorari should be granted.

HAROLD R. LOVE,
Petitioner for Himself
and the United States.

APPENDIX

(Filed July 30, 1951)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

THE UNITED STATES OF AMERICA,
Plaintiff
No. 3291 (Fourth Division)
vs.
DAVID W. ONAN, et al,
Defendants,
No. 1892 (Third Division)

The above entitled matters came on for hearing before the Honorable Gunnar H. Nordbye, a Judge of the above court, in the United States Court House in Minneapolis, Minnesota, on July 9, 1951.

APPEARANCES:

Benedict Deinard, Esq., and R. H. Fryberger, Esq.
Attorneys for Moving Defendants.

Mr. H. R. Love and Mr. H. M. Roberts,
Attorneys pro se.

THE COURT: There are certain matters scheduled for hearing this morning.

THE COURT: I will hear you.

MR. DEINARD: ...Of course our motion to dismiss or to stay is made in response to Judge Gardner's statement on

pages 8 and 9 of the decision simply because we felt that in the light of Judge Gardner's statements we have no alternative but to bring the matter to Your Honor's attention. The statements by Judge Gardner are not dicta. They are made arguendo in the course of his discussion of the sufficiency of the affidavit of prejudice. Therefore I take it can't be dismissed as being mere dicta. It is part of the opinion. Certainly in light of the opinion of the Circuit Court of Appeals we can't stand by idly and countenance an appearance which the Court says is improper; .....

* * * * *

We have nothing to add to what Judge Gardner said.

THE COURT: (Addressing Love) You recognize then that in view of Judge Gardner's decision that neither you nor Mr. Roberts will be authorized to conduct this lawsuit and that you would have to obtain counsel to represent you to conduct the suit. The Court will give you any reasonable time that you may think is necessary in order to obtain counsel.

MR. LOVE: We are not able to. We have had plenty of time and we can't get them.

THE COURT: Then you are stating to the Court this morning that you are in accord with the motion made that the cases may be dismissed?

MR. LOVE: No, I am not consenting to it, Your Honor....

THE COURT: Do you put it this way, that while you don't consent to the Court granting the motion, you are in accord that the correct interpretation of Judge Gardner's opinion is the Court must dismiss this lawsuit unless you obtain counsel?

MR. LOVE: No, Your Honor.....

THE COURT: You have indicated to me that you are in accord with the interpretation that Mr. Deinard has given to Judge Gardner's language in his decision.

MR. LOVE: No. If I gave that impression, that was the wrong impression .....
I say it is wrong, in my contention it is wrong.

THE COURT: How about you, Mr. Roberts?

* * * * *

MR. ROBERTS: Thank you, Your Honor. Whatever Mr.

Love has said up to this time I would like to point out to the Court that that applies to him only and does not include me. He has said on several occasions "we", but I want to point out that refers to him only. During the past few months this respondent has done some investigating upon his own ———

THE COURT: When you say "this respondent" let us not get into any legal language you may not particularly understand. To whom do you refer?

MR. ROBERTS: Myself, Your Honor. And consequently, as the result of these matters this case has become quite clear. I don't know whether it is up at this time. The defense attorneys have made the motion to dismiss this suit. They have served a notice of motion and the motion to be heard, and I wish, as a matter of record, to state that I support the motion to dismiss this suit. They have served a notice of motion and the motion to be heard, and I wish, as a matter of record, to state that I support the motion to dismiss this suit on the ground that the United States of America, through its District Attorney, has made an appearance and has withdrawn. I do not know what the reason is, but I do not doubt the discretion or decision of the District Attorney and the Government..... I feel that it is only fair and just that I take the attitude that this case should be dismissed. At the pleasure of the Court I would like to ask that if this case can be dismissed that it be with the dismissal of the orders of the Court of November 8th and December 22nd, and that I be removed entirely from this suit.

Thank you, Your Honor.

THE COURT: In any event, I think the record may indicate Mr. Roberts has personally appeared and has joined with the defendants in their motion to dismiss these proceedings; and as I understand it Mr. Love has stated to the Court that as far as he is concerned he does not intend to take any further steps in the prosecution of this lawsuit and that he intends to abandon any further proceedings in this Court. Is that right?

MR. LOVE: Not if the appeal reverses the matter.

THE COURT: How is that?

MR. LOVE: If on the appeal it is reversed I intend to come

back into this Court.

THE COURT: I don't know what appeal you are talking about.

MR. LOVE: The Supreme Court.

THE COURT: I don't know that there is anything further for us to do this morning. I will take the matter under advisement.

I certify the foregoing is a true and complete transcript of the proceedings had in the above-entitled matters on the date therein shown.

(s) FRANK A. MASSEY,

Official Court Reporter.